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February 6, 2006

NEPA Draft Report Comments; c/o NEPA Task Force
US House Committee on Resources
1324 Longworth House Office Bldg.
Washington, DC 20515 nepataskforce@mail.house.gov

RE: NEPA Draft Report – Initial Findings and Draft Recommendations

Dear NEPA Task Force:

I am writing on behalf of Associated Oregon Loggers, Inc. [AOL], which represents more than 1,000 logging and allied forest member companies. These companies play a major role in management of private & public forests throughout Oregon— as contractors, purchasers and vendors of forest management services (operators). These Oregon forest professionals employ approximately 10,000 workers in the continuous improvement of operation management to sustain Oregon's forests. AOL works to promote sustainable forest management, a reliable timber supply, and federal regulations & policies that encourage sound forestry on all land ownerships.

The existing regulations and implementing guidance for the National Environmental Policy Act (NEPA) clearly obstruct the timely and scientifically-proven forest management actions—which are necessary to protect and sustain Oregon's federal forest resources. Current NEPA policies are outdated, are excessively costly, are inordinately cumbersome, cause endless project delays, and are unmistakably harmful to the environment.

Many project-level decisions become so unwieldy under the weight of ineffective NEPA policies, that today federal forests are imminently threatened by serious problems. These problems include catastrophic wildfire, pest epidemics, storm damage, deforested landscapes after catastrophic events, invasive species infection, and spread of these threats to neighboring non-federal property. These problems harmfully impact federal forest health, injure nearby non-federal property, and damage the economic & social viability of Oregon's rural forest businesses and communities.

AOL supports the Resource Committee's comprehensive examination of ways to modernize and improve the antiquated NEPA law & policy. AOL offers several recommendations concerning your Draft Report. We urge the NEPA Task Force to please consider the following concerns:

Recommendation 1.1

We support this recommendation and believe that this is one of the most important Task Force recommendations. As currently implemented, federal agencies with high political controversy treat almost all actions as "major federal actions." We strongly discourage the use of vague terms to define "major federal action" in the statute which would invite further litigation to clarify the terms such as the word "substantial." There should be some concrete way to determine what is and what is not a "major federal action." We are especially opposed to an expansive definition of major federal action that would include ongoing projects— where requiring a halt to projects for further NEPA analysis would be costly & disruptive. We would prefer to have "major federal action"

limited to new projects. If ongoing projects are included, then explicit bounds must be placed on the obligation to perform NEPA analysis for such projects. For example, the Supreme Court in Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 124 S. Ct. 2373, 2385 (2004) held that for a land use plan, the major federal action is completed upon approval of the plan and there is no ongoing "major federal action" that requires further NEPA supplementation. Any effort to clarify "major federal action" must also address "significantly affected quality of human environment."

Recommendation 1.2
While we support this recommendation in concept, we are concerned that specific timelines for completion of NEPA documents may not always prove useful in expediting the process, and could focus agency efforts on meeting timeframes rather than adequately meeting procedural and substantive requirements of the various legislation and regulation.

Recommendation 1.3
We support this recommendation, particularly statutory recognition of the categorical exclusion. We suggest that the amendment specifically address different purposes of the three levels of analysis & documentation. We oppose the reality that environmental assessments (EA) currently are nearly as exhaustive as environmental impact statements (EIS). We recommend that any amendment would significantly limit the detail and scope of an EA—reducing its current content.

Recommendation 1.4
We have creditable reservations about adding the CEQ regulation on supplementation of NEPA documents into the statute. Today, with agencies bombarded by exhaustive new information weekly, there must be narrow bounds on when supplemental environmental analysis is required; or in the words of the Supreme Court, it will "render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." Marsh v. Oregon Natural Resource Council, 490 U.S. 360, 392 (1989). The CEQ regulation has poorly defined limits on supplemental analysis; therefore the CEQ regulation on supplementation must *not* be added to the statute.

Recommendation 2.1
Although we support this recommendation in concept, the regulations must be amended to give greater weight to substantive comments. And as the Task Force suggested, please discourage giving equal weight to mass mailing & campaign responses to NEPA documents and federal proposals. It would also be helpful for Congress to emphasize that the purpose of NEPA is to inform agency decision-makers and publics about the environmental consequences of proposed actions. While the public may comment on a draft EA or EIS, this process is not a referendum on the proposed action. Rather, public comment is a tool to gather further information about environmental consequences. Obviously, the public-at-large must be allowed to comment on proposed actions, but this should occur under the agency decisionmaking process. The public should be educated that comments on a draft environmental analysis should address the content and methodology of the analysis, not the merits of the proposed agency action.

Recommendation 3.2
We strongly support this recommendation. Duplication of analysis and coordination requirements is a waste of time and scarce public financial resources, and this recommendation would help

eliminate that duplication. The law must explicitly provide that a biological opinion prepared pursuant to Section 7 of the Endangered Species Act is the functional equivalent of NEPA requirements.

Recommendation 4.1

We support these proposals for clarifying judicial review. We recommend that in addition, such a provision make clear that having an economic interest in the proposed action does not disqualify an entity from standing to challenge the quality of the NEPA analysis or from intervening to defend the analysis. Provide that a perspective bidder or leasee on a proposed project—or the contract holder or holder of a lease for the project—have a right to intervene in any NEPA action challenging the project. Place the burden of proof on plaintiff to show by clear and convincing evidence that the Forest Service decision was insufficient—not based on the best available science and that the missing information was actually essential to a reasoned choice among alternatives. We understand that your statistics suggest that only a small portion of NEPA analyses are challenged in federal court. However, judicial interpretations of NEPA have far greater impact than just the case at hand. NEPA cases truly epitomize the axiom of "bad facts make bad law." One NEPA decision binds federal agencies throughout an entire federal appeals circuit; a single decision often may influence judicial and agency decisions throughout the country—not just for future projects, but also encumbering ongoing projects under contract or lease. An example is the *Lands Council* decision described in our comments on Recommendation 8.1 below. For the Forest Service, violations of NEPA are by far the most common claims in litigation. During the past 13 years, over 400 lawsuits have been filed with NEPA claims, resulting in often ambiguous, conflicting and transient standards with which the agency must attempt to comply.

Recommendation 4.2

AOL does not support this recommendation. Although we support the need for timely dissemination of court decisions and their applicability to federal planning and documentation, this recommendation is fatally flawed. The proposed CEQ "clearing house" would cause additional administrative procedures, and become another costly and unnecessary obstacle for federal agencies to overcome. As an alternative, we recommend that CEQ be directed to conduct a rulemaking every three years to address NEPA interpretations by the federal courts of appeals.

Recommendation 5.2

We support the specific recommendation, and believe it is a concept that Congress should clarify—or else the courts will. While CEQ regulations, directing analysis of impacts resulting from inaction would be helpful, statutory language would establish the concept once and for all. However, we are concerned with the statement in the explanation of the recommendation, which states: "An agency would be *required* to reject this alternative if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision." (Emphasis added.) While we fully support this statement in principle, we oppose inclusion of such a directive in NEPA. As the Supreme Court recognized, NEPA is strictly a procedural statute ensuring that federal agencies on the environmental effects of a proposed action so that the agency may make an informed decision; the law does not mandate any "particular substantive environmental results." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989); *accord Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). We prefer to keep NEPA procedural and thus recommend that the Task Force describe this recommendation "making it likely an agency

would reject this alternative" or "an agency would be justified in rejecting this alternative." In this manner, Congress recognizes the agency's authority in a manner that, as the Supreme Court described in *Methow Valley*, "inevitably brings pressure to bear on agencies." *Robertson v. Methow Valley Citizens Council* at 349.`

Recommendation 5.3

This recommendation warrants serious revision. As stated, this recommendation is unclear. We question whether CEQ has the authority to require an agency to implement mitigation on its own actions, let alone impose mitigation on a license or permit issued to a private applicant. Mitigation should certainly be considered by agencies, but should only be mandatory at the agency's discretion. Agencies often rely on mitigation to conclude that a project may not significantly affect the quality of the human environment. The NEPA statute should be revised to provide that—if an environmental assessment decision notice contains a commitment that mitigation measures will be included in a contract, license, or permit—then the person may not challenge the project on the grounds that its environmental effects will be significant and require an EIS.

Recommendation 6.1

We conditionally-support agency "consultation" with stakeholders, so long as NEPA remains simply a public disclosure law—rather than a public participation law. Other laws require various forms of public participation in agency planning and decision-making; and therefore NEPA must not be duplicative of these laws, or impose additional requirements on agencies.

Recommendation 7.1

AOL cannot support this recommendation. EPA already reviews agency EISs. Although the EPA review is supposedly limited to assessing the adequacy of the analysis, often EPA seeks to interfere with, or alter, agency decisions. A CEQ role would add confusion by creating unnecessary layers of bureaucracy, which would result in undue pressure on the decision-maker, delays, and added costs.

Recommendation 8.1

AOL recommends that the Task Force restate the recommendation to avoid any confusion of your intent: "Recommendation 8.1: Amend NEPA to clarify that agencies evaluate the effect of past actions in the assessment of existing environmental conditions." This would avoid any misperception that agencies should employ the same methodology for analysis of cumulative impacts and assessment of existing environmental conditions. The treatment of the effects of past actions is a prime example of the confusion created by a single judicial decision, no matter how many lawsuits are filed. The Forest Service has generally treated the effects of past actions as part of the existing conditions analysis, i.e., analyzing conditions as they are now clearly covers the effects of past actions in the area. In *The Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005), the U.S. Court of Appeals for the Ninth Circuit invalidated this approach and ruled that past actions must be included in the cumulative impact analysis. Our recommendation would return analysis of past actions to the proper place in the EIS.

Recommendation 8.2

We strongly support any steps by Congress to either address the treatment of cumulative impacts in statutory language, or in directives to CEQ for rulemaking. This issue, the scope of cumulative impact analysis, is one where the federal courts have been particularly active. Since the courts are

not bound by any requirement for consistency, federal agencies—particularly, but not limited to, the U.S. Forest Service—are faced with ever-expanding directives for conducting these analyses. Without cogent rules explaining geographic and temporal scope of the analysis, courts are free to demand whatever scope the particular judge feels comfortable with.

Recommendations 9.1, 9.2, and 9.3

AOL supports these recommendations. These studies are very much needed, and the information should be made available to Congress, and the public.

Finally, Congress should relocate the language regarding major federal actions significantly affecting the quality of the human environment from Sec. 102(2)(C) to the beginning of Sec. 102(2). Thus, 102(2) would be revised to read "(2) all agencies of the federal government shall for every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment -" The language from 102(2)(C) would then read "prepare a detailed statement by the responsible official on -."

Thank you for the opportunity to comment on the "Draft Report". If our comments create questions, please do not hesitate to contact AOL. We look forward to working with both Congress and the Administration on updating NEPA; so that it becomes an effective tool, rather than the costly obstruction that it is today.

Sincerely,
/s/ Rex D. Storm
Rex Storm, CF
Forest Policy Manager
Associated Oregon Loggers, Inc.